IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.436 of 1994.

Judgement reserved on: 21.8.2006.

Decided on : 23.8.2006.

Prem Nath Kashyap & anr. …..Appellants.

VERSUS

Narinder Kumar & ors. …..Respondents.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : Mr. G.C.Gupta, Sr. Advocate with Mr. Mohinder Gautam, Advocate.

For the Respondents : Mr. A.K.Sood, Advocate, for respondent No.1.

Surjit Singh, Judge

Appellants, hereinafter called plaintiffs, filed this appeal against the judgement and decree, dated 6.10.1994, of learned District Judge, Shimla, whereby accepting the appeal filed by the respondents, the learned District Judge set aside a decree of permanent prohibitory injunction of trial court passed in a civil suit instituted by the plaintiffs- appellants and dismissed the suit.

The appeal was admitted by this court on 19.12.1994 on the following substantial question of law:-

> Whether the findings of the court below with respect to easement by grant or in the alternative as an easement necessity are vitiated by the non-consideration of the

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Whether the reporters of the local papers may be allowed to see the Judgment?

sale deed dated 28.9.1931 (Ext.P-1) and the plan annexed therewith alongwith other evidence?

Facts relevant for the disposal of the appeal may be noticed. The predecessor of the plaintiffs-appellants, namely Yeshwanti Devi, now deceased and represented by the present appellants, filed a suit seeking issuance of permanent prohibitory injunction as also mandatory injunction against the respondents-defendants, pleading the following cause of action.

Plaintiff was owner in possession of House No. 6, Upper Kaithu Bazar, Shimla. She had been approaching the first floor of the said house through the stairs shown by letters A.B.C.D., in the plan attached with the plaint. She acquired this right by prescription as she/ her predecessors- in -interest had been using the said stairs for approaching the first floor of the house for the last more than twenty years and such user continued within two years of the filing of the suit. It was also alleged that plaintiff had been using the aforesaid approach as an easement of necessity also in addition to easement by prescription. Defendants- respondents No. 1 and 2, who became the owners of the adjoining property by purchase from respondents No. 3 to 6, started interfering in the aforesaid right of passage of the plaintiff. On 20.7.1982, taking advantage of the old age and ill-health of the plaintiff, they started demolishing the stairs at points A.B.C.D. Plaintiff prevented them from doing so with the help of neighbours. She also reported the matter to the police. Then she filed the suit for permanent prohibitory injunction restraining the respondents-

defendants No. 1 and 2 from causing any interference in her right to approach the first floor of her house through the stairs, in question.

The suit, which was originally filed in 1982, was amended in the year 1984 and relief of mandatory injunction was added. It was alleged that during the pendency of the suit, defendants No. 1 and 2 had covered the site adjacent to A.B.C.D., which was in the form of a "Dangi" (retaining wall), by extending the roof of their shop over it and by putting up a shutter, as a result of which, access to the stairs shown by letters A.B.C.D., stood obstructed/ closed.

During the pendency of the suit Yeshwanti Devi died and the present appellants came on record in her place.

Suit was contested by the respondents- defendants. It was denied that the plaintiff had acquired easement by prescription to approach the first floor of her house through the stairs, in question, or that it was a case of an easement of necessity. It was alleged that alternative approach was available to the plaintiff from the back side of the first floor of her house. It was stated that document of the year 1931, relied upon by the plaintiff was neither binding nor did it have any effect on the rights of the respondents- defendants. (Plaintiff had made no reference of any document of the year 1931 in her plaint).

The trial court after framing the issues and recording the evidence of the parties, concluded that the plaintiff had acquired right of easement by prescription as also on account of necessity and was, therefore, entitled to the relief of prohibitory injunction as well as mandatory injunction. Consequently, a decree was passed,

restraining the respondents- defendants from causing any interference in the right of the plaintiffs- appellants to approach the first floor of their house through the stairs, shown by letters A.B.C.D., in the plan Ex. P-2, and a mandatory injunction was also issued directing the respondents to remove the shutter and the wall, which had obstructed the approach through the aforesaid stairs to the first floor of the house of the plaintiffs- appellants.

Appeal was filed by the respondents- defendants in the court of District Judge. The learned District Judge has accepted the appeal, set-aside the judgement and decree of the trial court and consequently dismissed the suit, holding that the right created in the predecessor of the appellants- plaintiffs vide sale-deed Ex. P-1 had not remained intact, and as such, the right of easement by prescription and/ or necessity was also not available to the plaintiffs-appellants.

During the course of the hearing of the appeal, it was urged by the learned counsel for the appellants that the learned District Judge while setting aside the decree of the trial court has not touched the evidence pertaining to the plea of acquisition of easementary right by prescription nor has he given any reasons for setting aside the finding of the trial court qua this plea of the appellants- plaintiffs and therefore, the judgement and decree of the learned District Judge are liable to be set aside on this score alone. He also urged that Ex. P-1, the sale deed dated 28.9.1931, which was executed in favour of the predecessor-in-interest of the plaintiffs by Sehaj Ram, whereby the house was sold, specifically provided the

passage to the first floor of the house through the “Dangi” and the stairs shown by letters A.B.C.D., and that at that time the adjoining property of defendants No. 1 and 2 was also owned by said Sehaj Ram. He submitted that the said sale-deed created easementary right by grant in favour of the predecessor of the appellants- plaintiffs.

It may be stated at the very out-set that in the plaint plea of acquisition of easement by grant has not been raised even implicitly and therefore, appellants-plaintiffs cannot be allowed to take this plea, on account of it being not covered by pleadings, and that too at the stage of second appeal. Learned counsel urged that the defendants themselves in para-2 of the written statement had made a reference to the sale-deed Ex. P-1, and therefore, it could not be said that they were not aware of the creation of right of easement by grant in favour of the plaintiffs- appellants. No doubt, defendants-respondents made a reference to the sale deed in para-2 of the written statement but they did not say that any right was created by the said sale-deed. On the contrary what they stated was that the document in the year 1933 (sic) relied upon by the plaintiffs was neither binding nor had it any effect on the rights of the present owners.

As already noticed, the appellants- plaintiffs pleaded that they had acquired easementary right of access to the first floor of their house through the stairs, in question, by prescription. They did not make even a whisper of their alleged claim of easement by grant. Therefore, it is too late in the day for them to now claim that they are

entitled to the right of passage through the stairs, in question, on the basis of grant made vide sale deed Ex. P-1.

The judgement of this court in **Vir Khanna and others** vs. **Shori Lal and others,** [1999 (2) Shim.L.C. 258] relied upon by the learned counsel for the appellants, wherein it has been held that right of passage acquired by grant cannot be changed by providing alternate passage, is of no avail to the appellants- plaintiffs. The appellants-plaintiffs, as a matter of fact, did not lead any other evidence, worth noticing, in support of their plea that they have acquired easementary right by way of prescription. They proved the sale deed Ex. P-1 and plan Ex. P-2, in which the claimed passage is shown. By proving these documents, they tried to show that right of passage had been granted to them through the sale deed and they have been enjoying this right ever since the execution of the said sale deed. The sale-deed, as already noticed, was executed in the year 1931. Now, if the right of passage is claimed on the basis of this sale deed, the same cannot be said to be an easementary right acquired by prescription. The sale-deed created an easementary right by grant, but the appellants- plaintiffs, for the reasons best known to them, have chosen not to enforce this easementary right by grant and have instead pleaded that they have acquired easementary right by prescription and no evidence to prove this plea of acquisition of easementary right by prescription has been led. Under these circumstances, no fault can be found with the finding of the learned first appellate court that the appellants- plaintiffs have not acquired the claimed easementary right by prescription, though the reasons

stated by the first appellate court for arriving at this finding are different, which I do not endorse.

Alternative plea of easement of necessity raised by the appellants- plaintiffs has also rightly been rejected by the first appellate court, because it has come in evidence that alternate passage is available for the first floor of the house of the plaintiffs-appellants from the back side.

For the foregoing reasons, the appeal is dismissed.

August 23, 2006. **(Surjit Singh)**
(Hem) **Judge.**